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No. 153

In the Supreme Court of the United States

OCTOBER TERM, 1960

FRANK R. COPPOLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The petition in this case covers two judgments, petitioner having been convicted at separate trials of two robberies (Court of Appeals Docket No. 25177, involving robbery of the Manufacturers and Traders Trust Company; Court of Appeals Docket No. 25257, involving robbery of the Liberty Bank of Buffalo). The majority and dissenting opinions of the Court of Appeals, sitting *en banc*, in the first of these cases

appear at 2 R. 46-73 [1] and are reprinted at Pet. 33-60. The majority and dissenting opinions of the *en banc* court in the second case appear at No. 25257, 3 R. 55-56, and are reprinted at Pet. 61-62. The opinions are not yet reported.[2]

JURISDICTION

The judgments were entered on May 20, 1960 (2 R. 76; No. 25257, 3 R. 59). The petition for writs of certiorari was filed on June 17, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's confessions of federal offenses to F.B.I. agents, made while in the custody of Buffalo city police, were properly admitted in evidence on the ground that the facts of this case do not bring it

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[1] "R." refers to the printed record, in two volumes (including the Court of Appeals proceedings, contained in volume 2), in No. 25177. "No. 25257, R." refers to the printed record, in three volumes (including the Court of Appeals proceedings, contained in volume 3), in No. 25257. The prefix figure in each instance indicates the volume. "Tr." refers to the reporter's transcript in case No. 25177; "No. 25257, Tr.", to the reporter's transcript in case No. 25257.

[2] The *en banc* court, in each case, reversed an earlier decision of a three-judge panel (which had divided two to one), vacated the division's judgment and withdrew its opinion (2 R. 74; No. 25257, 3 R. 57). The original majority (2 R. 1-8) and dissenting (2 R. 9-16) opinions in case No. 25177 appear at Pet. 16-23, 24-32. The original majority and dissenting opinions in case No. 25257 appear at No. 25257, 3 R. 2-3, 12. See also Pet. 45-46, n. 1.

within the principle of *McNabb* v. *United States*, 318 U.S. 332.

STATEMENT

On July 11, 1957, petitioner was convicted in the United States District Court for the Western District of New York, following a jury trial, of robbing a branch bank of the Manufacturers and Traders Trust Company, a member bank of the Federal Reserve System, in violation of 18 U.S.C. 2113(a) (1 R. 3-5, 195-196). On December 2, 1957, following a separate jury trial in the same court, he was convicted of aiding and abetting the robbery of a branch of the Liberty Bank of Buffalo, likewise a member bank of the Federal Reserve System (No. 25257, 1 R. 9-11, 163, 164). For each offense he was sentenced to 20 years' imprisonment, the terms to run consecutively (1 R. 195-196; No. 25257, 1 R. 164-165). On appeal, a three-judge panel reversed (one judge dissenting) [3] both convictions on the ground that confessions to the offenses by petitioner, made to agents of the Federal Bureau of Investigation while he was in the custody of the city police of Buffalo, New York, had been improperly received in evidence under the rule of *Anderson* v. *United States*, 318 U.S. 350, in which this Court applied the rationale of *McNabb* v. *United States*, 318 U.S. 332, to the particular factual situation there involved (see *infra*) (Pet. 16-32, 45-46,

[3] The majority consisted of Judges Waterman and Washington (the latter, a regular member of the Court of Appeals for the District of Columbia Circuit, sitting by designation). Judge Moore dissented.

n. 1). On motion of the government, a rehearing *en banc* was ordered, and, on May 20, 1960, the *en banc* court, dividing three to two,[4] sustained the convictions (Pet. 33-60, 61-62).

Both cases present the same issue.[5] The relevant facts (adduced in each case at a hearing held out of the presence of the jury) may be summarized as follows:[6]

On February 15, 1956, a branch bank of the Manufacturers and Traders Trust Company (the "M. & T. Bank") was held up and robbed by two masked men (Tr. 41-52). The Federal Bureau of Investigation and the Police Department of the City of Buffalo had

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[4] Judge Moore wrote the majority opinion, in which Chief Judge Lumbard and Judge Friendly concurred. Judges Waterman and Clark dissented.

[5] The confessions involved in the two cases—an oral and a written confession in the Manufacturers and Traders Trust Company case (1 R. 132-143) and an oral confession in the Liberty Bank case (No. 25257, 1 R. 130-137)—were made in the course of a single interview (see *infra*).

[6] At pages 9-10 of the petition, reference is made to testimony by petitioner that he was deprived of wholesome food during the period of his confinement in the Buffalo police headquarters and that his confessions were otherwise involuntarily made. This testimony was sharply disputed (see, *e.g.*, 1 R. 17, 22, 27, 30, 35-36, 37, 41; No. 25257, 1 R. 95, 107). In each case the substance of the testimony bearing on the issue of voluntariness was repeated before the jury, and the trial judge submitted the issue to the jury for resolution (see 1 R. 129-130, 185-186, 189-190; No. 25257, 1 R. 129, 155-156, 159). Each jury presumably resolved that issue against petitioner. Since that issue is in any event no longer involved, our summary of the facts will omit reference to the testimony pertinent thereto.

this robbery under investigation from the time of its occurrence (1 R. 117-118). They "worked very closely" with each other in attempting to solve it (1 R. 117). If they "had any information [they] wanted to work on", they would "assign a detective and an agent together to work it out" (1 R. 118). Petitioner was a prime suspect as early as February 20, 1956, five days after the robbery (Tr. 168).

On October 2, 1956, another Buffalo bank, a branch of the Liberty Bank of Buffalo, was held up and robbed (No. 25257, 1 R. 134-137). This robbery was also within the investigative jurisdiction of the F.B.I. (1 R. 113, 119).[7]

On January 7, 1957, John Roche, Special Agent in Charge of the Buffalo office of the F.B.I., informed John Golombeck, Chief of Detectives of the Buffalo Police Department, that the F.B.I. had received information that a Buffalo butcher whose first name was Paul and whose last name was unknown had been robbed on the night of January 4, 1957, by petitioner and two other men, named D'Antuono and Simmons; he asked Golombeck if the Buffalo police had any record of such a robbery.[8] Golombeck told

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[7] It was also, of course, within the jurisdiction of the Buffalo police. Whether the F.B.I. and the Buffalo police worked together on this case does not appear from the record.

[8] One Buyers, a confidant of petitioner, to whom petitioner had revealed his participation in both the M. & T. and Liberty Bank robberies (Tr. 242-243; No. 25257, Tr. 547-549), had informed the F.B.I. of these disclosures, and thereafter made regular reports to the F.B.I. regarding his

Roche that the police did have a record of such a robbery, and that the victim's name was Paul Redlinski. Roche furnished Golombeck with photographs of petitioner and his two companions, and, on the following day, Redlinski identified petitioner, from his photograph, as one of the persons who had held him up. (1 R. 111, 97, 104.)

On January 9, 1957, Roche informed Golombeck that the F.B.I. had received information that petitioner, D'Antuono, and Simmons were contemplating the commission of another robbery at 10 o'clock on the following morning, and that it was possible that the place which the robbers were planning to hold up was the El Chico Tavern on Clinton Street (1 R. 112). Roche also gave this information to John Dwyer, the District Attorney for Erie County, "so that he might take whatever action he desired to protect the citizens of Buffalo and to prevent, if possible, another hold-up" (1 R. 112-113). Roche further told Dwyer that the F.B.I. had been investigating petitioner in connection with the M. & T. Bank robbery, the Liberty Bank robbery, and the "contemplated" robbery of a third Buffalo bank, the Marine Trust Company (1 R. 113).

The following morning, January 10, 1957, Golombeck, in the company of Lieutenant Harry Klenk and another police officer of the Buffalo Police Depart-

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associations with petitioner (Tr. 268; No. 25257, Tr. 558). Buyers testified at length before the juries in these cases concerning statements petitioner made to him relative to his participation in these robberies (Tr. 243 *ff.*; No. 25257, Tr. 547 *ff.*).

ment, proceeded by automobile to the vicinity of Clinton and Babcock Streets in Buffalo (near the El Chico Tavern), where, some time between 9:30 and 11 a.m., they saw petitioner, D'Antuono, and Simmons in an automobile and took them into custody (1 R. 77-78, 82, 97-98, 112). Petitioner and his companions were committing no crime at the time (1 R. 77) and the officers had no warrant for their arrest (1 R. 82).

The decision to apprehend petitioner and his companions was solely that of the local police officers (1 R. 84, 105). No F.B.I. agent was present at the time, nor had the F.B.I. requested such action (1 R. 105, 121).

Shortly after 11 a.m., Golombeck telephoned Roche and told him that he and the other Buffalo officers had apprehended petitioner, D'Antuono, and Simmons in the vicinity of the El Chico and that they were then on their way to police headquarters with them (1 R. 112, 118). Roche, asked at the hearing if he was "expecting a call from Golombeck at the time [he] got it," said that he was "not necessarily" expecting such a call, but that he "thought" Golombeck would call "if anything had developed" (1 R. 121). Golombeck testified that he made this call as "a courtesy extended to [Roche] for supplying me with the information" (1 R. 106).

Petitioner and his two companions were taken by the local police officers to the Buffalo police headquarters, where they were placed in a cell block at about 11 a.m. (1 R. 79, 99). No formal charge was placed against petitioner immediately (1 R. 78-79).

Although he was "booked" at 3:45 p.m. on the charge of robbery of Paul Redlinski, and at 4:15 p.m. on a burglary charge preferred by one Sidell (1 R. 86), petitioner was not arraigned by state authorities until approximately 2 or 3 p.m. on the following day (1 R. 82, 106; No. 25257, 1 R. 106-107; see *infra*, pp. 12-13).[9] From time to time during the afternoon and evening of January 10 (the day of the arrest), petitioner was interrogated by state and local officers concerning his connection with numerous state offenses, including the Redlinski robbery, the Sidell burglary, a crime in Niagara Falls (not more specifically identified), and two bank robberies[10] (1 R. 87). Among those who questioned him were members of the Buffalo Police Department, officers of the Bureau of Criminal Investigation of the New York State Police, and the local District Attorney's office (No. 25257, 1 R. 99).

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[9] New York law provides that an arrested person "must in all cases be taken before the magistrate without unnecessary delay, and he may give bail at any hour of the day or night" (Code of Criminal Procedure, § 165). A two-hour lapse between arrest and arraignment was held not to constitute an unnecessary delay in *Tierney* v. *State*, 178 Misc. 421, 34 N.Y.S. 2d 749 (Ct. of Claims, 1942), modified on other grounds, 266 App. Div. 434, 42 N.Y.S. 2d 877 (1943), 292 N.Y. 523 (1944). Delays of 14 hours (*Bass* v. *State*, 196 Misc. 177, 92 N.Y.S. 2d 42 (Ct. of Claims, 1949)) and 24 hours (*People* v. *Cohen*, 243 App. Div. 245, 276 N.Y.S. 851 (1935); *People* v. *Kelly*, 264 App. Div. 14, 35 N.Y.S. 2d 55 (1942)) have been held to constitute unnecessary delays.

[10] The two bank robberies were described as "[t]he bank holdup at North End * * * and the holdup of the Market Bank out on Clinton Street" (1 R. 87). It is not clear whether the banks thus described were the Liberty and M. & T. banks or other banks.

In addition, petitioner appeared in three "showups" or "lineups" conducted by the Buffalo police (1 R. 9, 48, 52, 53, 90).

Shortly before noon on the day of the arrest (January 10), following the receipt of Golombeck's telephone call, agent Roche proceeded to the Buffalo police headquarters "to ascertain * * * whether or not anything had occurred relative to" the bank robberies which the F.B.I. had under investigation (1 R. 113, 119). At the police station, Roche saw Golombeck, Klenk and Dwyer, and was informed that petitioner and his companions had not as yet been questioned (1 R. 119). Roche, Golombeck, Klenk and Dwyer then went to lunch together, following which Roche returned directly to the police station (1 R. 119-120).

At about 2:30 or 3:30 p.m., Roche talked to petitioner in the presence of District Attorney Dwyer (1 R. 114). Dwyer explained to petitioner who he was and who Roche was, told petitioner he was interested in him in connection with "a series of various crimes," and proceeded to question him about the Redlinski hold-up (1 R. 114). After the conversation between Dwyer and petitioner had gone on for a while, Roche, according to the latter's testimony, "interjected and asked [petitioner] about the M. & T. bank robbery" (1 R. 114, 120). In connection with that robbery, Roche asked petitioner if he had any objection to the F.B.I.'s searching his home in Niagara Falls (*ibid.*). Petitioner said he did not. Roche then explained to petitioner that the F.B.I. had a form known as a "permit to search" and asked if petitioner would have any objection to signing such

a form. Petitioner said he would not object. Roche then left Dwyer and petitioner and telephoned his office to request that one of the forms be sent him. When the form arrived, Roche took it to petitioner, who then declined to sign it, stating that he preferred that his home not be searched. (1 R. 114-115.)

According to petitioner, "When Mr. Dwyer questioned me in front of Mr. Roche it was on the M. & T. Bank". Asked if "several other robberies" were not mentioned in addition to the M. & T. robbery, petitioner replied that "They pointed out their information on other robberies, but [said that] by cooperating on the M. & T. Bank I would get a break on everything." To the question, "Who said that?", petitioner replied, "Either Mr. Dwyer or Mr. Roche," adding that he did not remember which because "Both men were talking at the same time." (1 R. 64.)

Later that day, Roche assigned Special Agents Robert Eddy and Omar Jenson to interview petitioner (1 R. 115).[11] At approximately 8 p.m., Eddy and Jenson went to the police headquarters (1 R. 8), where they sought and obtained from Chief Golombeck permission to interview petitioner (No. 25257, 1 R. 77). Because petitioner, at the time, was participating in a lineup being conducted by the police, the agents had to wait until the lineup had been completed before they could commence their interview (1 R. 9; No. 25257, 1 R. 76-77).

The interview lasted from approximately 9 p.m. to shortly after 12:45 a.m. (1 R. 11). At the com-

[11] Other agents were assigned to interview D'Antuono and Simmons (1 R. 115).

mencement of the interview, agent Eddy told petitioner that he did not have to talk to the agents, that any statement he might make to them could be used against him in court, and that he had a right to an attorney (1 R. 17, 22, 27, 31, 39). Petitioner told the agents that he "understood those rules" and remarked that Eddy had "told them to him once before" [12] (1 R. 17). At 9:41 p.m., he "started to tell us about the crimes he was involved in," including the M. & T. and Liberty Bank robberies (1 R. 28, 138-140; No. 25257, 1 R. 131-137). The latter part of the interview (from 11:37 p.m. till shortly after 12:45 a.m.) was taken up with the preparation by agent Eddy of a written confession, as dictated to him by petitioner, of petitioner's role in the M. & T. crime (1 R. 30, 38; G. Ex. 43, 1 R. 142-143).

The agents' interview with petitioner was at one point interrupted for a period of between two and five minutes when District Attorney Dwyer entered the room to show petitioner "a boot which had been taken from another man" and ask him questions about it (1 R. 40; No. 25257, 1 R. 73). The discussion had nothing to do with the M. & T. robbery (1 R. 40). Agent Eddy testified he could not recall how many questions Dwyer asked because he "didn't pay very much attention to what Mr. Dwyer was talking about. It was a matter other than we were discussing" (No. 25257, 1 R. 73).

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[12] Petitioner had on a previous occasion, approximately two weeks after the M. & T. robbery, been interrogated by Eddy concerning that robbery (1 R. 54; Tr. 73 *et seq.*).

On two occasions during the interview (and those of other agents with D'Antuono and Simmons, which were simultaneously going on), Lieutenant Klenk went to the cell block for the purpose of interrogating the prisoners about matters he and the city police were interested in, and on a third occasion he went to procure them for purposes of a lineup, but in each instance desisted on seeing that their interviews with the agents were still in progress (1 R. 89, 90, 91; No. 25257, 1 R. 103, 110). He did so "[a]s a matter of courtesy", he explained (1 R. 91). "[I]n case there are visiting policemen from other cities or towns or state police or F.B.I.," he said, "if we have a prisoner and they are talking to them we show them the courtesy of letting them talk to our prisoners" (*ibid.*). "I was able if I cared to", Klenk testified, to "take [the prisoners] away from [the agents]. They were our prisoners, but [the agents] were visiting headquarters and we showed them the courtesy of letting them talk with them" (No. 25257, 1 R. 103).

At approximately 10 o'clock the following morning, January 11, 1957, a complaint charging petitioner with violations of the federal bank robbery statute was filed, at agent Roche's direction, with the United States Commissioner (1 R. 116; No. 25257, 1 R. 115-116). At about the same hour, Roche called Lieutenant Klenk to request that the Buffalo police surrender custody of petitioner to the F.B.I. "so that they [the F.B.I.] could arraign him" on the federal charges (1 R. 88, 116). In the apparent belief that this was agreeable to the Buffalo police, and that the police would transfer the custody of petitioner to the

F.B.I. before 11 a.m., an appointment was made by the F.B.I. with the United States Commissioner for the arraignment of petitioner on the federal charges at 11 a.m. (1 R. 116). Klenk, however, after talking to Roche, called District Attorney Dwyer and told him of Roche's request. Dwyer told Klenk to wait until he heard further from Dwyer before taking any further action. Shortly thereafter, Dwyer called Klenk back and requested that he take petitioner to Dwyer's office, which Klenk did, arriving shortly before 11 a.m. Petitioner remained there for approximately two hours. (1 R. 88.) Meanwhile, when petitioner had not been brought to the United States Commissioner's office by 12:30 p.m. (it was Roche's understanding that petitioner would be brought by the Buffalo police to the Commissioner's office, where, after being delivered to the F.B.I., he would be federally arraigned), Roche called the Buffalo police headquarters to determine the cause of the delay. On learning that petitioner (and the other two prisoners) were at Dwyer's office, Roche proceeded there, where he was advised that the prisoners had not yet been arraigned "on the State charges" and that arrangements to that end were being made. (1 R. 116; see also No. 25257, 1 R. 105-106.) At approximately 2 or 3 p.m., petitioner was arraigned on the state charges in the Buffalo City Court (1 R. 82, 106; No. 25257, 1 R. 106-107), following which, at approximately 4 p.m., he was delivered to the federal authorities and promptly arraigned before the United States Commissioner (1 R. 105, 116-117).

ARGUMENT

1. In *Anderson* v. *United States*, 318 U.S. 350, this Court, applying the rationale of *McNabb* v. *United States*, 318 U.S. 332, to the factual situation there involved, reversed federal convictions based on confessions made to federal agents while the defendants were being detained by state authorities in violation of a state statute—a statute prohibiting the commitment to prison of any person for a criminal matter prior to examination before a state magistrate. Pointing out that the defendants were not federally arrested and arraigned until days after they had been intensively questioned by the federal officers while in state custody and their confessions obtained, the Court concluded that "The considerations which led to that decision [*McNabb*] also govern this case" (318 U.S. at 355) because (*id.*, p. 356):

> There was a working arrangement between the federal officers and the sheriff of Polk County which made possible the abuses revealed by this record. Therefore, the fact that the federal officers themselves were not formally guilty of illegal conduct does not affect the admissibility of the evidence which they secured improperly through collaboration with state officers.

Petitioner urges (Pet. 13-15), and the dissenting judges below concluded, that the *Anderson* decision and rationale govern this case as well. We submit, however, that the majority below were correct in holding this case to be materially different on its facts from *Anderson*.

The confessions involved in *Anderson* were products of a true collaborative effort by state and federal authorities (the Sheriff of Polk County, Tennessee, and agents of the F.B.I.) as they jointly sought to solve the identical crime, the dynamiting of TVA-owned power lines. The *Anderson* record shows that the federal agents and the sheriff and his deputies worked hand in hand in the interrogation of the prisoners. The sheriff or one of his deputies would apprehend a suspect for questioning, and the federal agents would proceed to conduct the questioning, often in the presence of one or more of the state officers (Record, No. 10, Oct. Term, 1942, pp. 172-173, 176, 181, 305, 308, 309, 333). Further illustrative of the close "working arrangement" which existed between the state and federal officers in *Anderson* is the fact that the sheriff was present at some of the federal agents' meetings at which they mapped out courses of action (*id.*, pp. 169-170, 334-335, 436-437, 472-473), including one at which the participants "went over a list of individuals that we thought might possibly be implicated" (*id.*, p. 170). In addition, federal agents, in some instances, accompanied deputies when the latter went out to bring suspects in for questioning (*id.*, pp. 630, 633, 635, 746-748, 792-798).[13]

No such collaborative effort was involved here. The evidence indicates that the apprehension of petitioner

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[13] For other indications of the close "working arrangement" between the state and federal officers, see *id.*, pp. 186-187, 191, 194, 195, 196, 302, 332, 375, 427-428, 442, 467, 540, 556, 801-802, 817.

was solely the act and responsibility of the city police, that petitioner's detention thereafter was likewise the act and responsibility of the local authorities, and that the state and local authorities and the federal agents acted substantially independently of each other in interrogating petitioner. The federal officers had to obtain the permission of the city police to question petitioner (*supra*, p. 10). The F.B.I. agents had to wait until a police lineup had been concluded before they could commence their interview (*supra*, p. 10). The F.B.I. interview was interrupted by Dwyer, a state official, as he conducted business of his own with petitioner (*supra*, p. 11). Klenk, the police lieutenant, wanted to question petitioner about matters the police were interested in while the F.B.I. interview was in progress; he refrained from doing so, but solely as a matter of courtesy to the F.B.I.; there was no question that Klenk regarded petitioner as one of "our prisoners" (*supra*, p. 12). The evidence further shows that the state and local officers questioned petitioner about crimes they were interested in and that the federal officers questioned him about crimes they were interested in. There were numerous crimes as to which the state officers questioned petitioner with which the federal officers had no concern. The particular crimes with which the federal officers were concerned were, it is true, also the concern of the state and local officers, but even as to those crimes the evidence indicates that, with the possible exception of the brief joint interview of Dwyer and Roche with petitioner on the afternoon of January 10 (see *supra*, pp. 9-10), there

was no joint questioning. Finally, the state and local authorities' refusal to surrender the custody of petitioner to the F.B.I. for the latter's arraignment purposes until after they had accomplished their own arraignment purposes [14] (*supra*, pp. 12-13) shows that the state and local authorities considered petitioner to be at all times their prisoner, and that they refused to subordinate their interests to those of the federal authorities until it suited their convenience to do so.

It is indeed true, as petitioner stresses (Pet. 13), that *prior to petitioner's apprehension* the F.B.I. and the city police collaborated closely with each other in attempting to solve the M. & T. Bank robbery (*supra*, pp. 4-5). But this does not indicate that there was a "working arrangement" (in the *Anderson* sense) between the police and the F.B.I. in *detaining petitioner and interrogating him* concerning his part in that crime. As observed by the majority below, "If this cooperation [between the F.B.I. and the Buffalo police in attempting to solve the M. & T. case] reached the point of arrest and detention by local police for the purpose of enabling federal officers to question [petitioner] concerning [that crime] for a period of time forbidden to federal officers by Rule 5(a) of the

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[14] As pointed out by the majority below, the F.B.I. interrogation of petitioner (on the evening of January 10) "did not contribute to any delay in [his] arraignment [on the state charges]" (Pet. 39). This is because (as both counsel agreed on oral argument) petitioner could not have been arraigned after 5 p.m. on January 10 in the Buffalo City Court (where he was in fact arraigned on the following afternoon), so that the earliest time after 5 p.m. on January 10 that he could have been arraigned in that court was the morning of January 11 (see *ibid.*).

Federal Rules of Criminal Procedure, admissions thus obtained would properly be excluded. * * * The rule excludes confessions when the 'working arrangement' includes the illegal detention—in other words, when federal law enforcement officers induce state officers to hold the defendant illegally so that they may secure a confession. However, to bring a case within this rule there must be facts, as there were in *Anderson*, not mere suspicion or conjecture" (Pet. 41).

The record shows cooperation and mutual courtesy between the federal and state authorities as each went about its respective business; it does not show a "working arrangement" resulting in a "collaborati[ve]" deprivation of a prisoner's rights in the sense condemned in *Anderson*. Cf. *White* v. *United States*, 200 F. 2d 509, 511-513 (C.A. 5), certiorari denied, 345 U.S. 999; *Brown* v. *United States*, 228 F. 2d 286, 289 (C.A. 5), certiorari denied, 351 U.S. 986; *Horne* v. *United States*, 246 F. 2d 83 (C.A. 5), certiorari denied, 355 U.S. 878; *Papworth* v. *United States*, 256 F. 2d 125, 127-129 (C.A. 5), certiorari denied, 358 U.S. 854; *Carpenter* v. *United States*, 264 F. 2d 565, 571 (C.A. 4); *Tillman* v. *United States*, 268 F. 2d 422, 425 (C.A. 5). "In the absence of any evidence of collaboration to achieve an unlawful end," there is no basis, as the court below stated (Pet. 42), for excluding "uncoerced confessions made during a detention by state officers which the Federal officials did not induce and were powerless to prevent." [15]

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[15] This conclusion is not impaired by *Elkins* v. *United States*, No. 126, Oct. Term, 1959, decided June 27, 1960, which turned on the defendant's claim that evidence obtained

2. Judge Waterman, in his original majority opinion (later ordered withdrawn by the *en banc* court), referring to the government's contention that to prohibit the use in federal courts of confessions obtained by federal officers during an illegal detention by the local police it is necessary that the detention be "at the instance or at the request of federal officers", said (Pet. 20-21, 49-50):

> Clearly such an interpretation of the phrase "working arrangement" [as used in *Anderson* v. United States, *supra*, 318 U.S. at 356] would result in an affirmance of the decision below, for the facts surrounding defendant's arrest do not, in our opinion, require the inference that the Buffalo police acted upon the request of the FBI, expressed or implied.

In his dissenting opinion following the rehearing *en banc*, the same judge, as an alternative basis for reversal, expressed the view (Pet. 55-60)—based on inferences drawn from his reading of the record, and contrary to his original conclusion, *supra*—that petitioner's arrest and detention by the local officers were designed, "at least in part", to "satisfy the desires of the FBI" and to make possible the "circumvent[ion]" by the F.B.I. of the rule of the *McNabb* case, 318 U.S. 332 (Pet. 55, 59).

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from him was seized in violation of *constitutional* rights. We deal here with a claim which has no constitutional aspect—a claim that petitioner's arraignment by state officials in the state court for state offenses was not as prompt as required by state law. None of the judges of the Court of Appeals and neither of the two trial judges found any basis for concluding that petitioner's confession was coerced or was *constitutionally* invalid.

Judge Waterman's inference is directly contrary to the findings of the two trial judges who presided in these cases.[16] The issue was purely one of fact, and the trial judges had the advantage of seeing and hearing the witnesses. Under well settled principles, therefore, their findings are conclusive unless clearly erroneous.[17]

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[16] In the Liberty Bank case, following the hearing out of the presence of the jury, counsel for the government asked the presiding judge if he found "as a matter of fact no working agreement existing between the F.B.I. and the Buffalo Police Department with respect to the Buffalo Police arresting this man or men and holding them so the F.B.I. could question them." The judge replied that "[t]hat was a necessary prelude to" his finding that there had been no unnecessary delay in the federal arraignment of petitioner. (No. 25257, 1 R. 130.) For the relevant findings in the M. & T. case, see 1 R. 129.

[17] In one of the two cases, counsel for petitioner expressly conceded at the hearing that he "d[id] not claim that the Buffalo Police made an arrest at the behest of the F.B.I," (No. 25257, 1 R. 120). Government counsel, who had commenced to question agent Roche on the subject, then said, "With that on the record I have no further questions" (*ibid.*). Later in the hearing, evidently for the purpose of making certain that there was no need to present further proof on the issue, government counsel stated his understanding that counsel for petitioner was making no "claim that the arrest was made by the local authorities at the behest of the F.B.I.", and counsel for petitioner repeated his concession (No. 25257, 1 R. 130). As a consequence, the government adduced no further evidence on the subject.

The dissenting judges below seek to discount the significance of counsel's concession by distinguishing between "behest" and "request" (Pet. 59-60). In the context in which counsel's concession was made, see *supra*, we doubt that counsel had any such distinction in mind. In any event, it is clear that as a consequence of the concession the govern-

We submit that the majority below correctly concluded that the trial judges' findings were supported by the record and must be sustained. The F.B.I. (as noted above), upon learning through its confidential informant (see fn. 8, *supra*, pp. 5-6) that petitioner and two companions, D'Antuono and Simmons, had committed a local crime over which it had no jurisdiction (the Redlinski robbery), conveyed its information to the Buffalo police. This was no more than a normal act of federal-state cooperation in law enforcement. When the F.B.I. further learned, evidently from the same source, that the same three men were planning to commit another state offense (the robbery of a local tavern), it was of course obligated to make this information known to the local authorities so that preventive measures could be taken. When the police found the men in the area in which the F.B.I.'s informant said they would be and at the time predicted, and thereupon took them into custody, it was both natural and proper that they should inform the F.B.I. of this development. Since the F.B.I. was investigating these same men in connection with federal offenses, it was reasonable for the F.B.I., on learning that the men were in custody, to seek permission of the police to question them, and it was equally understandable that the police, particularly considering the helpful information it had received from the F.B.I., should grant

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ment refrained from developing the point further. In these circumstances any ambiguity that might be thought to survive in the record ought not to be grounds for disturbing the trial judge's findings.

such permission. The majority concluded that the trial judges were fully warranted in finding "that the F.B.I. in no way caused or contributed to Coppola's detention by the Buffalo police" (Pet. 35). The majority stated further that "there is in this record no basis for the conclusion that the apprehension and continued detention of Coppola and his companions was at the behest of federal officers or for the purpose of aiding any investigation they wished to conduct" (Pet. 40). It is not infrequent that different appellate judges, having appraised a record, come away with different impressions of the facts. That hardly makes the case one appropriate for review in this Court, especially when the prevailing view in the Court of Appeals upholds the validity of findings independently reached by two district judges.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writs of certiorari should be denied.

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